Before the
Administrative Hearing Commission
State of Missouri

CARL J. HAWN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 13-0171 P0
	)	
DIRECTOR OF DEPARTMENT OF PUBLIC SAFETY,	)	
	)	
	)	
Respondent.	)	

DECISION

Cause exists to deny Petitioner Carl J. Hawn's application for entrance into a basic training course, because he committed criminal offenses and misrepresented a material fact.

Procedure

On February 1, 2013, Mr. Hawn filed a complaint appealing the Director of the Department of Public Safety's decision to deny him entrance into a basic training course. The Director answered on February 19, 2013.

We held a hearing on May 28, 2013. Mr. Hawn appeared and represented himself. The Director appeared through his counsel, Assistant Attorney General Ross Brown. The case became ready for decision on August 12, 2013, when the parties concluded briefing.[1]

[1] After the hearing transcript was prepared, we entered a briefing schedule that was to conclude no later than July 17, 2013 with the filing of Mr. Hawn's brief. He submitted his brief on August 12, 2013. On our own motion, we grant Mr. Hawn leave to file it out of time and treat it as filed on August 12.

Findings of Fact

1. In 2000, Carl J. Hawn was arrested for and charged with third-degree assault. He later "took a plea bargain."[2]

2. In 2003, Mr. Hawn was arrested for passing a bad check and later paid a fine. § 570.120, RSMo (Supp. 2002).[3]

3. In 2008, Mr. Hawn was arrested for and later pled guilty to passing a bad check. § 570.120, RSMo (Supp. 2007).

4. In 2010, Mr. Hawn was arrested for felony unlawful use of a weapon. He was carrying a concealed firearm, the firearm was loaded and capable of lethal use, and he did not have a concealed carry endorsement.[4] No charges were filed.[5]

5. In 2012, Mr. Hawn applied for entrance into a basic training course offered by the Drury University Law Enforcement Academy.

6. As part of the process to gain admission to a basic training course, and to obtain peace officer licensure, Mr. Hawn filled out a Missouri Peace Officer License Legal Questionnaire form and submitted it to the Director in August 2012. He filled out and submitted a second one in December 2012. He signed both questionnaires under oath, beneath the preprinted statement: "I am aware that causing a material fact to be misrepresented for the

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[2] The Director's evidence, Exhibit D, proves Mr. Hawn's arrest but not the subsequent disposition. Mr. Hawn admitted at the hearing herein that he "took a plea bargain," explaining that he did so because he is a hunter and wanted to continue to be able to own a firearm to hunt. Tr. 18. But the record contains no evidence of the nature of the bargain.

[3] The Director did not offer court records regarding the 2003 bad check incident. But Mr. Hawn admitted he "had gone to jail on that" incident and "paid the fine." Tr. 24. And when describing the 2003 bad check incident, and a second one that occurred in 2008, he admitted that "the bad checks were written." Tr. 26.

[4] Tr. 19-20.

[5] Tr. 20.

purpose of obtaining a peace officer license issued pursuant to Chapter 590 RSMo, is a Class B Misdemeanor."[6]

7. The Missouri Peace Officer License Legal Questionnaire form contains the question, "Have you ever been arrested for, or charged with, any criminal offense?"[7] Mr. Hawn answered "yes" both times he filled out the form.[8] Checking the "yes" box triggers the instruction printed beneath the box to "describe the offense(s)" in the table provided.[9] The form further provides, "If needed, you may attach additional pages."[10]

8. On the questionnaire he submitted in August 2012, Mr. Hawn described one offense, as follows:

Date	Charge/Offense	City/County/State	Misd/Felony/Ordinance	Disposition	Arresting Agency
	Bounced check	Jeff city	Misd	Fine	Cole Co

He left blank the space for the date of the bounced check offense.

9. On the questionnaire he submitted in December 2012, Mr. Hawn described three offenses, as follows:

Date	Charge/Offense	City/County/State	Misd/Felony/Ordinance	Disposition	Arresting Agency
24/6/03[11]	Bad Check	SPFD Green MO	Misd	Paid Fine	SPD
08/12/12	Unlawful use	Greene Co/MO	Felony	Dismissed	Greene Co PD
08-[[12]]-08	Bad Check	Cole Co/MO	Misd	Paid Fine	Cole Co PD

6 Respondent's Exhibit C.

7 *Id*.

8 *Id.*

9 *Id.*

10 *Id*.

11 Mr. Hawn filled out the forms by hand. As we understand it, Mr. Hawn's notation of this date follows a day-month-year format, rather than the month-year-day format he uses elsewhere. Regardless, we find that in this first row of the table, he was describing the bad check incident that occurred in 2003.

12 The brackets represent handwriting that is illegible.

10. On January 15, 2013, the Director of the Department of Public safety denied Mr. Hawn's application for entrance into a basic training course.

Conclusions of Law

We have jurisdiction. § 590.080.2, RSMo.[13]

The Director is responsible for granting and denying applications for entrance into a basic training course. § 590.100, RSMo. The Director bears the burden of proving that cause exists to deny such an application, § 590.100.1 and .3, and must do so by a preponderance of the evidence, s*ee Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo.App. W.D. 2012) (dental licensing board demonstrated "cause" to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that "the fact to be proved [is] more probable than not." *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo.App. W.D. 2000)).

Our review is limited to the question of cause, which we separately and independently determine. *Kennedy v. Missouri Real Estate Commission*, 762 S.W.2d 454, 456-57 (Mo. App. E.D. 1988). We may "not consider the relative severity of the cause for denial or any rehabilitation of the applicant or otherwise impinge upon the discretion of the director [of the Department of Public Safety] to determine whether to grant the application subject to probation or deny the application when cause" does exist. § 590.100.3.

Section 590.100.1 provides that the Director "shall have cause to deny any application for…entrance into a basic training course when the director has knowledge that would constitute cause to discipline the applicant if the applicant were licensed." In relevant part, § 590.080.1 provides the Director with cause to discipline a peace officer licensee who:

[13] References to "RSMo" are to the Revised Statutes of Missouri (Supp. 2012), unless otherwise noted.

> (2) Has committed any criminal offense, whether or not a criminal charge has been filed; [or]
>
> ***
>
> (4) Has caused a material fact to be misrepresented for the purpose of obtaining or retaining a peace officer commission or any license issued pursuant to this chapter[.]

We first address the preliminary issue of the insufficiency of the Director's answer, and then address the violations of regulations.

A. Insufficiency of the Director's Answer

The Director proved that in 2003, Mr. Hawn received a citation for and later pled guilty to operating a motor vehicle without a license, § 302.020, RSMo (Supp. 2002), and that Mr. Hawn did not disclose the offense in the application process. But at the hearing, we noted that the Director in his answer failed to identify that offense or omission as bases for the Director's refusal to deny Mr. Hawn entrance into a basic training course. For the reasons discussed below, we conclude the answer is insufficient in this regard and therefore do not base our conclusions on that offense or Mr. Hawn's failure to disclose it.

In *Ballew v. Ainsworth*, a refusal-to-license case, the Court of Appeals explained that a case in which a petitioner seeks review of a licensing agency's action can be different from "most civil proceedings where the basic issues are set out in the first pleading and effectively joined by a simple denial," because "issues…often cannot be discerned with certainty until the agency files its answer stating the *reason* for its refusal. 670 S.W.2d 94, 103 (Mo. App. E.D. 1984). In such instance, the second pleading, the answer, serves the basic function of 'notice' in the sense of due process to the applicant." *Id.*

The circumstances also matter. In *Ballew*, the director of the licensing agency failed to specify in his answer the facts on which he relied, instead setting out the conclusion that the licensee was guilty of conduct proscribed by a cited criminal law. *Id.* The licensee argued that

those paragraphs of the answer should have been stricken and the director precluded from introducing related evidence, which would have prevented the director from proving the grounds for refusal to license. *Id.* The Administrative Hearing Commission refused to strike. *Id.*

The appellate court affirmed, reasoning that the licensee was indicted for the acts for which he knew the director refused to license him, and was fired by his employer for those same acts. *Id.* Although "it would have been better practice for the [d]irector to specify the facts on which he relied," the licensee was "fully aware of the reasons underlying the [d]irector's allegations in [the director's] answer and what was to be litigated at the hearing." *Id.* The court therefore concluded that this Commission had not abused its discretion in refusing to strike certain portions of the answer. *Id.*

Regulation 1 CSR 15-3.380(2)(E), concerning answers in cases before the Commission, is consistent with *Ballew*:

> (E) When the petitioner seeks review of respondent's action, [the answer shall] include—
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> 1. Allegations of any facts on which the respondent bases the action, with sufficient specificity to enable the petitioner to address such allegations;
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> 2. Any provision of law that allows the respondent to base the action on such facts;
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> 3. A copy of any written notice of the action of which petitioner seeks review, unless such written notice was included in the complaint; and
>
> 4. Facts that show that the respondent has complied with any provisions of law requiring the respondent to notify the petitioner of the action that petitioner is appealing

Here, the Director's answer mentioned other offenses and omissions, but not Mr. Hawn's plea of guilty to operating a motor vehicle without a license, or his failure to disclose it on his application. The answer could therefore not have put Mr. Hawn on notice in that respect.

Nor can we conclude that Mr. Hawn had actual notice notwithstanding the gap in the Director's answer. We note that Mr. Hawn included, as an attachment to his complaint, the

Director's letter denying his application. Although the Director's letter cites provisions of law and regulation in support of the denial, it does not describe in any detail the conduct Mr. Hawn committed and on which the Director relied in deciding to deny his application. Therefore, the letter, alone, does not provide sufficient notice.

But, the Director argues, Mr. Hawn was sufficiently apprised because, when he learned—at the hearing herein—that this plea and his failure to disclose it would be at issue, he admitted "under oath [to] perfect recollection of the event and how it happened" and so "revealed that he required no preparation or notice to meet and address the crime[.]"[14] We think not. The purpose of the notice requirement is to ensure that a defending party has the opportunity to prepare his defense. Even if Mr. Hawn "remember[ed] that day exactly when that happened[,]" as he testified,[15] we cannot conclude he had notice that was sufficient to afford him a meaningful opportunity to prepare his defense.

Accordingly, we do not base our conclusions on evidence of Mr. Hawn's plea of guilty to operating a motor vehicle without a license, or failure to disclose the offense on his application.

B. Cause for discipline, and therefore, denial

The Director has established cause by a preponderance of the evidence under both § 590.080.1(2) and (4).

1. § 590.080.1(2), criminal offenses

Section 590.080.1(2) provides cause for discipline when an applicant or licensee has "committed any criminal offense, whether or not a criminal charge has been filed[.]" We conclude Mr. Hawn has committed a total of three criminal offenses: passing a bad check, twice, and unlawful use of a weapon.

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[14] Respondent's Supplement to Proposed Order, p. 3.

[15] Tr. 17.

Mr. Hawn was arrested for passing bad checks twice, once in 2003 and again in 2008. He paid a fine (and thus was necessarily found guilty) with respect to the former, pled guilty with respect to the latter, and admits the bad checks were written. Accordingly, he committed both offenses for purposes of § 590.080.1(2).

With respect to the 2010 incident involving unlawful use of a weapon, the record reflects Mr. Hawn was arrested, but not charged. Section 590.080.1(2) does not require a charge to have been filed, and this Commission may decide whether conduct constitutes a criminal offense, even in the absence of a conviction. *See Director, Dept. of Public Safety v. Bishop*, 297 S.W.3d 96, 99-100 (Mo. App. W.D. 2009) (Administrative Hearing Commission may weigh evidence and draw its own conclusion regarding factual question of whether licensee engaged in conduct that constituted commission of a crime). Accordingly, we examine the criminal statute.

Section 571.030.1(1), RSMo (2009), provides that a "person commits the crime of unlawful use of weapons if he…knowingly…[c]arries concealed upon or about his…person…a firearm…readily capable of lethal use[.]" Subsection 1(1) does not apply if the person has a valid concealed carry endorsement. § 571.030.4. In regard to the 2010 incident, Mr. Hawn was carrying a concealed firearm on his person, the firearm was loaded and capable of lethal use, and he did not have a valid concealed carry endorsement. We conclude he committed the offense of unlawful use of a weapon under § 571.030.1(1).

The Director also points to a fourth incident: Mr. Hawn's arrest in 2000 for third-degree assault. The record does not show Mr. Hawn was tried and convicted of third-degree assault, or that he pled guilty to it. The record only shows that Mr. Hawn "took a plea bargain," not what charges he ultimately pled guilty to or the facts underlying the charges.[16] He also denies having

[16] Tr. 18. We note that Mr. Hawn volunteered this information at hearing, but the Director did not cross-examine him (or call him as a witness).

assaulted anyone.[17] The Director has not shown by a preponderance of the evidence that Mr. Hawn committed such an offense. We therefore reject this incident as a basis for finding cause under § 590.080.1(2).

The Director has cause under § 590.080.1(2) to deny Mr. Hawn's application based on Mr. Hawn's commission of three criminal offenses: passing a bad check (2003), passing a bad check (2008), and unlawful use of a weapon (2010).

2. § 590.080.1 (4), misrepresentation

Section 590.080.1(4) provides cause for discipline when an applicant or licensee "[h]as caused a material fact to be misrepresented for the purpose of obtaining or retaining a peace officer commission or any license[.]" A misrepresentation is "an untrue, incorrect, or misleading representation…[;] a representation by words or other means that under the existing circumstances amounts to an assertion not in accordance with the facts[.]" WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 1445 (1986). Mr. Hawn misrepresented a material fact for purposes of gaining entrance to a basic training course and obtaining his peace officer license.

Unlike the analysis in the preceding section concerning § 590.080.1(2) and an applicant's commission of offenses, analysis concerning § 590.080.1(4) requires us to look at what the applicant allegedly misrepresented, in this case, his arrests and charges. Specifically, the application form Mr. Hawn submitted asks, "Have you ever been arrested for, or charged with, any criminal offense?"[18] Mr. Hawn answered "yes" both times he filled out the form, in August and December 2012.[19] Checking the "yes" box triggered the instruction printed beneath the box to "describe the offense(s)" in the table provided.[20] The form further provides, "If needed, you

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17 Tr. 18.
18 Respondent's Exhibit C (emphasis added).
19 *Id.*
20 *Id.*

may attach additional pages."[21] The form is designed to impress upon applicants the seriousness of the disclosure by requiring them to sign the form under oath, beneath the explicitly stated caution that omission of a material fact for purposes of obtaining a peace officer commission or license is a Class B misdemeanor.[22]

On his August 2012 application form, Mr. Hawn disclosed one offense for which he had been arrested—passing a bad check in 2008. After he submitted the first form, he talked to the director of his police academy, who told Mr. Hawn he should describe "anything [he had] ever been arrested or booked…for."[23] Then Mr. Hawn submitted the second form. Mr. Hawn appears to have considered the December 2012 submission of the form as an amendment of, or supplement to, his first one. We construe it in the same way. But that does not resolve the misrepresentation issue.

On his December 2012 form, he listed a total of three offenses for which he had been arrested—he included the previously described bad check arrest in 2008, and added the 2003 bad check arrest and the 2010 unlawful use of a weapon arrest. He still did not describe, or even disclose, his 2000 arrest for third-degree assault.

The omission was more than a simple oversight. The form was plain and Mr. Hawn, by his own admission, understood he was to describe "anything [he had] ever been arrested or booked…for."[24] He was not confused and he did not forget he had been arrested for third-degree assault. He simply did not put it down.

We also conclude that what he omitted was material, for two reasons. He was instructed to describe his arrests, and he did not simply omit a detail in relation to an arrest, he omitted all information about the arrest. We further note that the three arrests he did describe were not for

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21 Respondent's Exhibit C.
22 *Id.*
23 Tr. 24.
24 *Id.*

violent crimes, but the arrest he omitted was. When the Director is assessing the propriety of a person's entrance into a basic training course and eventual licensure as a peace officer, the Director could logically be expected to look closely at, and to seriously consider the import of, an arrest for a crime of violence if disclosed. Had Mr. Hawn's omission gone undetected, the Director would not have had occasion to consider such a potentially significant arrest.

We conclude Mr. Hawn misrepresented a material fact for purposes of his application.

The Director has cause under § 590.080.1(4) to deny Mr. Hawn's application.

Summary

The Director has cause under § 590.080.1(2) and (4) to deny Mr. Hawn's application for entrance into a basic training course.

SO ORDERED on September 9, 2013.

\s\ Alana M. Barragán-Scott
ALANA M. BARRAGÁN-SCOTT
Commissioner